

CRIMEWATCH

Issue No 15, December 1996

CONTENTS

Money Laundering Conference	1
Recent Articles	
Confiscating the Proceeds of Crime	2
Jurisdiction in sex tourism cases	3
Case Notes	
Location of Proceeds of Crime	3
Legal Professional Privilege	4
Sentencing	5
Mareva Injunctions	6
Money Laundering	7
Self Incrimination	8

Southern and Eastern African Money Laundering Conference, Cape Town, October 1996

South Africa hosted the first meeting of Commonwealth African countries on money laundering. The Commonwealth Secretariat and the Financial Action Task Force accepted the invitation of Dr Dullah Omar, Minister of Justice of South Africa to organise the meeting of representatives of the thirteen Commonwealth countries in Southern and Eastern Africa. Representatives of a number of countries which are members of the Financial Action Task Force attended to share their national experiences in combatting money laundering with more than one hundred finance, legal and law enforcement officials who gathered to consider how best the region could cooperate to defeat this crime.

Delegates resolved to work towards the development of national and regional multi-disciplinary approaches to the problem. Each country recognised the desirability of establishing national co-ordinating groups on anti-money laundering matters.

The significant outcome of this wide-ranging meeting was the adoption of a resolution to recommend to governments in the region that a Ministerial Meeting be held to consider the proposal to establish a Southern and Eastern African Task Force to combat money laundering. Representatives from each participating country are now working to develop a draft agenda for such a meeting. When finalised the draft agenda will be submitted to relevant Ministers for their consideration and it is hoped that it will be possible have governments consider this innovative proposal in the near future. A regional task force would have the opportunity to build on the work already started in the SADC countries and to work, as the Caribbean Financial Action Task Force is doing, towards effective limitation of money laundering.

RECENT ARTICLES

Confiscating Proceeds of Crime, by Kelly Rees, Solicitor, New Law Journal, September 6, October 4 and October 18 1996

This article, published in three parts, considers the effects of the law concerning confiscation of proceeds of crime on legitimate creditors and *bona fide* third parties who have an interest in the property of the offender. The law relating to this is mostly found in two United Kingdom laws - the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 and is a mixture of both civil and criminal jurisdictions.

In order to preserve assets which may be affected by a confiscation order, the High Court is given powers to restrain, charge and realise property. The article discusses the meaning of the term "realisable property" which includes property in which the defendant has an interest or right, thereby including property in which others have a legitimate interest such as trusts, companies, mortgaged property and gifts. The Court's powers to deal with realisable property and the effect on third parties are considered in great detail. The author argues that the power to restrain property before conviction creates the potential for interference with the property rights of parties totally unconnected with the commission of any criminal offence.

The registration of restraint orders affecting real property are considered and the author suggests that such registration clearly affects rights to obtain compensation under the Land Registration Act 1925 because the registered order would have been made with reasonable cause. The difference in the way the law treats the ability to register restraint orders and Mareva injunctions is considered to be unwarranted.

The relationship between the confiscation laws and the laws on bankruptcy and winding up are considered by the author who notes that restrained, charged or realised property is excluded from the assets available to the trustee in bankruptcy or the liquidator in any winding up thereby reducing the assets available to unsecured creditors. It is argued that it is not clear why the Crown should benefit in such cases and that the aim of depriving offenders of the proceeds of crime can be achieved without adversely affecting *bona fide* creditors.

On the subject of compensation the article states that there is very limited provision for compensation of *bona fide* third parties where the defendant is not convicted or where a conviction is quashed or the person is pardoned even though they might have suffered damage to their proprietary interests.

In conclusion, the writer states that more generous provisions for protection and for compensation are desirable. " Surely, if anyone is to be punished for the defendant's crimes, it should not be the financial community."

(*It is useful to note that this article makes a reference to an article which contains an overview of the law in Australia, Canada and the USA: *Feldman, D, "Individual rights and legal values in proceeds of crime legislation: a comparative approach,"* (1988) 18 *Anglo-American Law Review* 261 at 269273.)

Jurisdiction in "sex tourism" cases: R. Ticehurst, New Law Journal, 13 December 1996, p 1826

In this article the author examines the principle that jurisdiction in criminal law depends on whether the alleged act is an offence under common or statute law and the need to amend this principle by the enactment of criminal laws having extraterritorial effect. Such laws, it is argued, are necessary to protect a country's reputation and to ensure that nationals do not escape jurisdiction simply by returning from abroad.

The common law approach to jurisdiction is contrasted to the active personality principle in force in civil law countries and the role of extradition in ensuring that nationals of common law countries do not evade justice is examined.

In this context the passage by the United Kingdom Parliament of the Sexual Offences (Conspiracy and Incitement) Act 1996 is examined. The Act creates a new offence which would "catch shady travel agents offering holidays involving sexual exploitation of children (incitement) or groups of people organising to go on such a holiday (conspiracy)." The Act, however, does not create extra-territorial jurisdiction because the offences of conspiracy and incitement must be committed within the jurisdiction of the courts of the United Kingdom.

The author argues that the UK legislation does not go far enough and cites as an example the case of a person who organises own "sex tourism" holiday (thereby neither conspiring or inciting) who cannot be tried under the new legislation. The difference between the UK approach and that of Australia is discussed.

In considering the limitations of the UK legislation the author points to the difficulty of conducting "long distance" prosecutions and the constraints imposed by the requirement for oral testimony and cross examination in the British tradition. The unavailability of a procedure for taking testimony by satellite except in cases of murder, manslaughter and complex fraud is given as an example of the limitations imposed by the current rules of evidence.

The recent decision of the British Government to introduce further legislation to confer extraterritorial jurisdiction in sex offence cases is also discussed. The author remarks that the proposed law is subject to significant limitations. It will only operate where extradition is either not sought or is not possible and where the principle of dual criminality is satisfied (including the element relating the age of the "victim"). It is suggested that the difficulty of bringing prosecutions under the proposed law will mean that its use will only be considered as a last resort.

CASE NOTES

Criminal Justice Act 1988 (UK) - Police and Criminal Evidence Act 1984 (UK) - production of material - criminal investigation - location of proceeds of crime - relevant procedures

These cases concerned two applications for judicial review. In the first, the Director of Public Prosecutions challenged the refusal at Guildford Crown Court to grant an order under s.93H of the 1988 Act, as inserted by s.11 of the Proceeds of Crime Act 1995, for the production of details of bank accounts in which the proceeds of prostitution were held. In the second, a judicial review was sought by an accountant of the order made at Southwark Crown Court under s.93H requiring the production of all business records of two clients facing charges of dishonesty.

Section 93H provides that, where there are reasonable grounds for suspecting that a specified person has benefited from any criminal conduct, a constable may, for the purposes of investigation into

whether any person has benefitted from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct, apply to a circuit judge for an order.....[for the production of] particular material.

Section 9 of the Police and Criminal Evidence Act 1984 deals with a similar matter and provides that a constable may obtain access to excluded material.....for the purposes of a criminal investigation by making an application under Schedule 1 which Schedule requires that there be reasonable grounds for believing that a serious arrestable offence has been committed; that there is material which is likely to be of substantial value to the investigation on the premises and that other methods of obtaining the material have not been tried because it appeared that they were bound to fail.

Applications under s.93H can be made *ex parte* and upon the existence of reasonable grounds for suspecting which those under s.9 had to be made *inter partes* and required that there be reasonable grounds for believing.

Held

In deciding under which section an application ought to be made, the question to be asked was what was the dominant purpose of the application?

- was it for criminal investigation purposes, to determine whether an offence had been committed and if so, to provide evidence of that offence; or
- was it to determine whether and if so to what extent someone had benefitted from a criminal offence or the whereabouts of the proceeds of a criminal offence, although not necessarily a specific offence, which the prosecution already had reasonable grounds for believing, rather than merely suspecting, had been committed,

Where an order for the production of material was sought, the use of s.93H of the Criminal Justice Act 1988 was appropriate to determine whether someone had benefitted from criminal conduct and /or the whereabouts of the proceeds. The use of s.9 of and Schedule 1 to the Police and Criminal Evidence Act 1984 was appropriate where the production of the material was for criminal investigation purposes to determine whether an offence had been committed and if so to provide evidence of that offence.

Regina v Guildford Crown Court, Ex parte Director of Public Prosecutions.
Regina v Southwark Crown Court, Ex parte Bowles. [1996] 4 All ER 961 (QBD)

Evidence - failure to answer questions - judge's direction to jury - legal professional privilege

The appellants, who were arrested and taken to a police station were advised by their solicitor not to answer questions, as he considered them to be unfit to be interviewed owing to drug withdrawal symptoms. According to the police medical examiner they were fit for interview. At the trial, each admitted to being a heroin addict but denied that heroin was ever supplied in the way or for the purpose alleged by the prosecution or at all.

The appellants were cross-examined on their failure to mention certain important aspects of their defence at interview. The reason they gave for not doing so was the advice of their solicitor. The United Kingdom Criminal Justice and Public Order Act 1984 deals with inferences which a jury may draw from a defendants failure to answer questions when interviewed.

In summing up, the judge directed the jury that it was a matter for them to decide whether any adverse inference should be drawn against the appellants from their failure to mention certain facts at interview.

On appeal, counsel for the appellants argued that the direction did not go far enough. The court was invited by counsel to give guidance on the admission of "no comment" interviews and on the question of legal professional privilege.

Held, dismissing the appeals:

If the accused gave as a reason for not answering questions that he had been advised by his solicitor not to, that advice did not amount to a waiver of privilege - at the same time, however, that on its own did not amount to an adequate reason for not mentioning matters that were relevant to the defence. If the accused wished to invite the court not to draw an adverse inference he or she must go further and state the basis or reason for the advice.

Although the matter was not fully argued, the court indicated that once the reasons for the advice were given there may be a waiver of privilege so that the accused or his or her solicitor could be asked whether there were any other reasons for the advice and the nature of the advice given so as to explore whether the advice had been given for tactical reasons.

Regina v Condran (William), Regina v Condran (Karen), *The Times*, November 4 1996.

Sentencing - Drug Trafficking Offences Act 1986, s. 6 (UK) - guilty plea - cooperation with Customs and Excise

The defendant pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of Class A controlled drugs and was sentenced to eight years imprisonment and a confiscation order in the sum of £5000 was made under the Drug Trafficking Act 1986, s. 6(2).

An appeal against sentence was lodged on the ground that the sentence did not properly take into consideration the guilty plea and cooperation with Customs and Excise and did not make a sufficient differentiation between the defendant and the two co-accused who received ten years' imprisonment for the offence.

The Court *held*, allowing the appeal in part:

Inadequate discount had been given for G's guilty plea and cooperation with Customs and Excise and that it was necessary to acknowledge and encourage those who were prepared, usually at serious personal risk, to give real assistance to the authorities in combating crime, therefore a discount on an otherwise correct sentence should be given.

A sentence of four and a half year's imprisonment was substituted.

R v Griffiths (Ivy Doreen) [1996] 1 Cr. App. (S.) 444.

Application for Mareva type injunction in aid of criminal law - whether civil or criminal proceedings - jurisdiction of civil court to grant civil injunctions in aid of criminal law

The appellant, Consolidated Fastfrate Transport Inc. was charged with the criminal offence of conspiring to prevent or to lessen unduly competition in the supply of pool car freight forwarding services contrary to certain statutory provisions. An injunction was issued restraining Fastfrate from disposing of any part of the proceeds of the sale of its assets or of winding up its corporate existence. The trial commenced in the Ontario Court (General Division).

The appellant appealed from the order on the ground that the court did not have jurisdiction to grant a Mareva injunction to secure assets out of which a fine could be paid if there was a successful prosecution.

Held: allowing the appeal

In certain exceptional circumstances, the jurisdiction of the civil court extended to the granting of Mareva injunctions in aid of criminal law. The Court of Appeal laid down the following principles to be applied in such cases:

- (i) it had to be shown that the accused had assets within the jurisdiction of the court;
- (ii) the Crown had to prove a strong prima facie case that the accused person would likely be convicted of the offence with which it was charged and that the amount of the fine would likely equal or exceed the value of the assets sought to be attached;
- (iii) the Crown had to demonstrate that the accused was or had been removing or disposing of its assets for the improper purpose of making them unavailable to pay a fine in the event of a conviction; and
- (iv) the Crown had to give the usual undertaking with respect to damages.

The trial judge had erred in equating the decision to commit for trial with the establishment of a strong prima facie case.

In this case the existence of the required improper purpose for removing or disposing of the assets had not been made out.

R v Consolidated Fastfrate Transport Inc. (Canada) [1995] 4 Law Reports of the Commonwealth 449

Money Laundering - Proceeds of Crime - Drug Trafficking (Recovery of Proceeds) Ordinance (Hong Kong) - words and phrases "concerned in an arrangement"

Each of the two applicants was convicted on one count of assisting another to retain the benefit of drug trafficking contrary to s. 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405. They were sentenced to 12 years imprisonment.

The first applicant was the brother of a major drug trafficker. He was a nominee shareholder and director of a number of companies owned by his brother and in this capacity he signed documents including account opening forms, agreements for the operation of nominee accounts, company resolutions, tax returns, etc. Many of these were signed in the presence of bankers and solicitors.

The second applicant was involved in moving moneys belonging to the drug trafficker into and out of accounts in nominee names.

Section 25 provides that it is an offence to enter into or be concerned in an arrangement whereby the retention of control by or on behalf of another of that person's proceeds of drug trafficking is facilitated in cases where the person involved in the arrangement knows or has reasonable grounds to believe that the other person carries on or has carried on or has benefitted from drug trafficking.

The second applicant sought to argue that the Crown was required to prove beyond a reasonable doubt that not only had he performed a conscious act but that he knew that the retention of the proceeds of drug trafficking was thereby facilitated.

For the first applicant it was argued that his brother only gave him information on a "need to know" basis and that he did not want to know the purpose of the transactions in which he was involved.

The appeal was brought on the basis of an alleged misdirection by the trial judge who directed the jury that reference to payments in the legislation included the proceeds of drug trafficking by other persons. Section 4 of the Ordinance defines the proceeds of drug trafficking as any payments or other rewards received by a person at any time in connection with drug trafficking carried on by him or another.

Held dismissing the appeals

The inference that the applicants had grounds to believe that the person whose accounts they handled was involved in drug trafficking was found by the jury to exist on the basis of evidence that "it was a notorious fact that Law Kin Man was wanted in the USA for drug trafficking".

Under section 25(1) what the prosecution had to prove was that, at the time the defendant was concerned in the arrangement involving the retention or control of the proceeds of drug trafficking, he had at least reasonable grounds to believe that the relevant person has been involved in drug trafficking. Once this threshold has been surmounted the defendant is then thrown back on his defence which is statutorily provided in sub-section (4) of that provision and which allows the defendant to establish either that he did not know or suspect that the arrangement related to the proceeds of drug trafficking or that he did not know or suspect that the arrangement would facilitate retention or control of the property.

The evidence of the drug trafficking of Law Kin Man was provided by a self-confessed drug trafficker who had dealt with Law Kin Man.

The Ordinance is not aimed only at the drug trafficker himself. It seeks to include the proceeds of other drug trafficking. To confine the words "other payments" to payments to the drug trafficker would seriously weaken its effect.

The Queen v. Lo Chak Man and Tsoi Sau Ngai, Hong Kong Court of Appeal - judgment delivered 7 November 1996

Self Incrimination - European Convention on Human Rights, Article 6 - Companies Act 1985 (UK) - compulsory acquisition of evidence

The applicant was chief executive officer of Guinness plc when the company acquired another company. Inspectors appointed by the UK Department of Trade and Industry commenced an inquiry into an allegation that during the takeover battle Guinness had artificially maintained or inflated its share price by means of an unlawful share support operation. The applicant was interviewed by inspectors and was required by law to answer the questions put to him. Failure to so do could result in fine or imprisonment pursuant to provisions of the Companies Act 1985 (UK).

Transcripts of the interviews were passed by the DTI inspectors to the Crown Prosecution Service and the police commenced their own investigation. The applicant was charged on 15 counts including counts of false accounting, theft and conspiracy. At trial the prosecution relied on transcripts of statements made by the applicant to the inspectors. The applicant was convicted. Various appeals were heard and determined. Application made to the European Commission of Human Rights was declared admissible in 1993. The matter came before the European Court of Human Rights.

Held

The right not to incriminate oneself, like the right to silence, was a generally recognised international standard which lay at the heart of the notion of a fair procedure under Article 6 of the European Convention on Human Rights. That right was closely linked to the presumption of innocence contained in the article and was concerned with respect for the will of the accused to remain silent.

Whether or not the applicant's right not to incriminate himself had been unjustifiably infringed depended on the use made by the prosecution at trial of the statements given under compulsion. It was irrelevant whether the statements made were self-incriminating.

The court determined that the applicant's statements had been used in an incriminating manner in order to cast doubt on the applicant's honesty. There was therefore an infringement of the right not to incriminate himself.

The public interest in combating crime could not justify the use of answers compulsorily obtained in a non-judicial investigation. The applicant was found to have been deprived of a fair hearing in violation of Article 6.1 of the Convention. The court did not speculate on whether the outcome of the trial could have been any different had use not been made of the statements and noted that its finding of a breach of Article 6 was not to be taken as a finding that the conviction was wrong.

Saunders v. United Kingdom Case 43/1994/490/572 reported in *The Times*, 18 December 1996.

LEGISLATION

Currently in its Committee Stages in the House of Lords is new British legislation dealing with the police. The Bill places the National Criminal Intelligence Service (NCIS) on a statutory footing and gives it the functions of gathering, storing and analysing information in order to provide criminal intelligence and of entering into collaboration agreements with police forces, law enforcement authorities and government departments. The Bill also establishes a National Crime Squad whose function will be to prevent and detect serious crime which is of relevance to more than one police area in England and Wales.

For the first time in England and Wales the Bill places the use of electronic surveillance by the police on a statutory footing. The provisions give powers to chief constables to act in cases of serious crime. The Bill has been criticised as failing to provide for judicial scrutiny of decisions to use electronic surveillance or "bug" telephones.